

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARK TUCKER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,068,540
<b>STONE MASONS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the July 31, 2014, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Claimant appears by counsel, Deborah K. Mitchell. Respondent and insurance carrier (respondent) appear by counsel, Roy T. Artman.

**ISSUES**

The Administrative Law Judge (ALJ) denied claimant's request for preliminary relief because "[c]laimant has failed to establish that he is in need of additional treatment."<sup>1</sup>

Claimant contends the ALJ erred in denying his request for additional medical treatment and testing recommended by Dr. Peter Bieri, the neutral physician appointed by the Court.

Respondent argues the Board lacks jurisdiction to review Judge Moore's Order.

The issues raised for the Board's review are:

1. Does the Board have jurisdiction to review the ALJ's preliminary hearing Order?

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<sup>1</sup> ALJ Order (July 31, 2014) at 1.

2. Did the ALJ err in denying claimant's request for additional treatment and testing recommended by Dr. Bieri?

#### FINDINGS OF FACT

On February 3, 2014, claimant filed an application for hearing alleging an accident on June 26, 2013, when claimant was lifting a cap stone. Injuries were alleged to the neck, back, right shoulder and arm, and "all body parts affected." On February 27, 2014, claimant's counsel served a seven-day notice of intent on respondent's counsel requesting "[t]reatment as recommended by Dr. Pedro Murati in his report dated February 12, 2014."

An application for preliminary hearing was filed on March 6, 2014, and the claim was scheduled for a preliminary hearing on April 11, 2014. In compliance with Judge Moore's local procedure, both counsel sent correspondence to the Judge dated April 9, 2014, providing copies of proposed exhibits and identifying the issues. The sole issue raised was medical treatment. In her letter to the ALJ, claimant's counsel stated claimant was "seeking the treatment recommended by Dr. Murati or in the alternative an IME by a neutral physician." In his letter to the ALJ, respondent's counsel stated "[g]iven the differing opinions of the respective physicians, the Respondent and Insurance Carrier have no objection to the appointment of a neutral physician should the court be so inclined to appoint the same to address this issue."

On April 10, 2014, counsel notified the ALJ by e-mail that the parties agreed on Dr. Peter Bieri to perform the IME. The preliminary hearing was canceled and no witness testified in the claim. On April 11, 2014, the ALJ entered a preliminary hearing order that provided in part:

The court exercises its authority pursuant to **K.S.A. 44-516** and appoints **Dr. Peter Bieri** as a neutral physician to do an independent medical examination, who is requested to examine Claimant, review pertinent medical records, and offer opinions as to the following: (1) diagnosis; (2) recommendations for treatment, if any; and (3) Claimant's ability to work and, if so, appropriate temporary work restrictions. **Dr. Bieri is expressly authorized to perform, or refer Claimant for, such additional diagnostic tests as are reasonably necessary to enable him to provide the opinions and recommendations herein requested.** If Claimant is determined to be at maximum medical improvement, Dr. Bieri is requested to offer his/her opinions on Claimant's permanent impairment of function, as determined by reference to the **AMA Guides to the Evaluation of Permanent Impairment**, 4<sup>th</sup> Edition, and appropriate work restrictions (emphasis in original).

The preliminary hearing Order was forwarded to counsel of record. No party requested Board review of the April 11, 2014, Order.

Also on April 11, 2014, the ALJ sent a letter to Dr. Bieri notifying him of his appointment as neutral physician and providing the doctor with a copy of the preliminary hearing Order. The letter stated: **“You are expressly authorized to perform, or refer Claimant for, such additional diagnostic tests as are reasonably necessary to enable you to provide the opinions and recommendations herein requested.”** (Emphasis in original.) A copy of the Judge’s letter was provided to counsel of record.

Dr. Bieri examined claimant on June 30, 2014, and authored a narrative report bearing the same date. Dr. Bieri concluded:

1. Claimant sustained injury to his right shoulder on June 26, 2013, with a diagnosis consistent with a rotator cuff tear.

2. Claimant was initially treated conservatively, and thereafter received surgical care and post-operative rehabilitation.

3. As to the right shoulder only, claimant achieved maximum medical improvement.

4. Claimant also “demonstrates peripheral neuropathy on a clinical basis involving the distal right upper extremity,” for which “claimant has had no formal diagnostic or treatment interventions.”<sup>2</sup>

5. Based on the *Guides*,<sup>3</sup> claimant’s permanent functional impairment was 15% to the right shoulder.

6. “The claimant demonstrates clinical findings consistent with brachial plexopathy or distal entrapment neuropathy. Based on history and documentation, this has not been addressed. A recommended [sic] is made for formal evaluation in the form of electrodiagnostic testing.”<sup>4</sup>

7. “The injury in question is considered to be the prevailing factor for such treatment recommendations.”<sup>5</sup>

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<sup>2</sup> Dr. Bieri report (June 30, 2014) at 4.

<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

<sup>4</sup> Dr. Bieri report (June 30, 2014) at 4.

<sup>5</sup> *Id.*

**PRINCIPLES OF LAW AND ANALYSIS**

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board has authority to review preliminary hearing orders only the extent of the jurisdictional issues in K.S.A. 44-534a(a)(2). Those issues are: (1) did the employee suffer an accidental injury or injury by repetitive trauma, (2) did the injury arise out of and in the course of the employee's employment, (3) was notice given, or (4) do certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim.<sup>6</sup> The Board can also review preliminary hearing orders when a party alleges the ALJ exceeded his/her jurisdiction.<sup>7</sup>

The Board lacks jurisdiction to review the issue raised by claimant. Pursuant to K.S.A. 44-534a, the ALJ had authority to decide whether claimant was or was not entitled to additional medical treatment reasonably necessary to cure and relieve the effects of claimant's injury. No jurisdictional issue was raised by any party before the ALJ, nor is a jurisdictional issue raised to the Board. The record reflects that the only issue raised was whether claimant was entitled to additional treatment to cure and relieve the effects of the accidental injury.

Whether an injured worker should be awarded authorized medical treatment is not an issue denoted as jurisdictional in K.S.A. 44-534a. The Board has repeatedly ruled in the past, and continues to hold, that issues regarding medical treatment are not jurisdictional in nature and are accordingly not subject to Board review of a preliminary hearing order.<sup>8</sup>

The Court of Appeals in *Allen*<sup>9</sup> held:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the Board lacks jurisdiction to entertain a review, the only appropriate action is to dismiss the appeal.

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<sup>6</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>7</sup> K.S.A. 2012 Supp. 44-551(i)(2)(A).

<sup>8</sup> See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219,395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

<sup>9</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

It is unclear why the electrodiagnostic testing recommended by Dr. Bieri<sup>10</sup> was not conducted pursuant to the ALJ's preliminary hearing Order and letter to Dr. Bieri dated April 11, 2014. Dr. Bieri was therein expressly authorized to perform, or refer claimant for, such additional diagnostic tests as were reasonably necessary to enable the doctor to provide the opinions and recommendations requested of him. The April 11, 2014, Order, and the letter associated with it, have not specifically been vacated or reversed and it is not apparent whether the ALJ intended for the July 31, 2014, Order to supercede the April 11, 2014, Order insofar as additional diagnostic testing is concerned. Arguably, Dr. Bieri is already authorized to conduct, or refer claimant for, the electrodiagnostic testing he recommended in his report, notwithstanding the preliminary hearing Order dated July 31, 2014. However, these questions are not jurisdictional in nature and the ALJ has authority to address them in further proceedings, if necessary.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the request for review of the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated July 31, 2014, is dismissed for lack of jurisdiction.

### **IT IS SO ORDERED.**

Dated this 23rd day of September, 2014.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

c: Deborah K. Mitchell, Attorney for Claimant  
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Roy T. Artman, Attorney for Respondent and its Insurance Carrier  
roy@kbiwcf.com

Honorable Bruce E. Moore, Administrative Law Judge

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<sup>10</sup> Dr. Bieri's report was the only evidence in the record. The medical records and reports provided to the ALJ by correspondence from counsel were not admitted into evidence.